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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 826

NATHAN BERGER, SAMUEL KAMINSKY and SIDNEY E. COHN,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

LOUIS B. BOUDIN,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Nathan Berger, Samuel Kaminsky and Sidney E. Cohn, respectfully pray that a *writ of certiorari* issue out of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit, made on December 5, 1944, affirming an order made and entered in the District Court of the United States for the Eastern District of New York, in an action entitled "United States of America v. Promenade Clothes, Inc., Nathan Berger and Samuel Kaminsky", which said order directed Petitioner Sidney E. Cohn to sign certain checks for the payment of moneys out of a fund theretofore deposited by

Petitioners Nathan Berger and Samuel Kaminsky in Brooklyn Trust Company, a banking corporation doing business in the Borough of Brooklyn, City and State of New York, on pain of being punished as for a contempt of court in the event of his failure to sign such checks.

A

Statement of the Matter Involved

On October 18, 1941, an Information was filed in the District Court of the United States for the Eastern District of New York against Promenade Clothes, Inc., a corporation, and Petitioners Nathan Berger and Samuel Kaminsky, charging violations of the Fair Labor Standards Act. The Information was in thirteen counts. Four of the said counts, each charged the failure by Promenade Clothes, Inc. to pay to a particular employee, during a particular week, the minimum wages required by said law. Four other counts, each charged Promenade Clothes, Inc. with failure to pay a particular employee, during a particular week, for overtime performed by such employee during that week, at overtime rates as required by said law. Two of the other counts, each charged the shipment on a certain day, in interstate commerce, of merchandise produced under conditions violative of the law. Two of the other counts, each charged false entries in the books of Promenade Clothes, Inc. with respect to the number of hours worked by and wages paid to a certain employee during a particular week. The remaining count (Count XI) charged failure to keep proper records, as required by said law and regulations made thereunder, covering the wages and hours of the employees of Promenade Clothes, Inc. from on or about August 3, 1939, up to the filing of the Information.

On November 10, 1941, the defendants, who had never been convicted before, pleaded guilty to the said Informa-

tion. The corporation was thereupon fined the sum of $500 on each count, and Petitioners Berger and Kaminsky were placed on probation for eighteen months,—the imposition of sentence being suspended as to them. The probation order contained, in addition to the usual matters contained in such orders, a provision reading as follows:

> "(b) Restitution of wages due by the defendants or the Corporation herein specifically named, to industrial workers under the Fair Labor Standards Act of 1938, shall be made by the defendants jointly and severally, in the sum of $27,094.08 in quarterly payments of $6,773.52, commencing March 10, 1942, and on each and every quarter thereafter until the full sum of restitution has been paid; allocation of the said restitution among the said industrial workers and the amount to be paid to each is to be determined by the Director of the New York Regional Office of the Wage and Hour Division of the United States Department of Labor or under his direction" (Record, fols. 66-67).

Some time prior to June 18, 1942, an order to show cause was made by a judge of the District Court directing the Petitioners Berger and Kaminsky to show cause why the probation should not be revoked and sentence imposed, because of an alleged failure to comply with the probation order in failing to make two quarterly payments of "restitution" when they became due under the terms of the said order. On June 18, 1942, Petitioners Berger and Kaminsky appeared by Petitioner Sidney E. Cohn, who by that time had become their attorney, and offered to pay into court the full amount mentioned in the probation order for distribution under the said order,—no "allocations" having been made up to that time by the Administrator of the Wage & Hour Division (Record, fols. 163-164).

Thereupon the attorney for Petitioners Berger and Kaminsky and the attorney for the Administrator agreed that the money be deposited with the Brooklyn Trust Company to their joint order, to be distributed by means of checks signed by the two of them after the persons en-

titled to share in the fund, and the extent to which each was entitled to share therein, should have been ascertained. As a means of such ascertainment, it was agreed between them that the attorney for Petitioners Berger and Kaminsky should designate a Certified Public Accountant who, in conjunction with the accountants for the Wage & Hour Division, should ascertain the persons who were entitled to "restitution", and the amount to which each was entitled,—the attorneys to act upon the report of such accountants (Record, fols. 164-166).

The money was accordingly deposited on the same day with the Brooklyn Trust Company; and immediately thereafter Petitioner Sidney E. Cohn appointed one David J. Algase, a Certified Public Accountant, as the accountant to represent Petitioners Berger and Kaminsky in the ascertainment of the persons to whom payment should be made out of the said fund. The Wage & Hour Division refused, however, to permit Algase to participate in such ascertainment, taking the position that it alone was entitled to designate the persons to whom payment was to be made, and it refused to show the accountant any books, papers, or other evidence upon which he could arrive at any judgment as to the accuracy of any lists prepared by the Wage & Hour Division (Record, fols. 242-248). The accountants for the Wage & Hour Division informed Algase that the lists to be prepared by them would not be based on any books or documents, but upon a certain formula alleged to be applicable to the industry as a whole, but they refused to give him any information as to the nature of the formula (fols. 243-244). Algase thereupon reported to Petitioner Cohn that under the circumstances he could not certify to the correctness of any lists prepared by the Wage & Hour Division (fol. 245).

No lists or schedules of "allocations" were actually furnished by the Wage & Hour Division to Petitioners until the following January; and when the same were furnished to Petitioner Cohn, the Wage & Hour Division refused to

submit to him any books, papers, or other evidence upon which the "allocations" were made, or to disclose to him the "formula" upon which the "schedules" were based. The "schedules" comprise some seven or eight hundred names, and the amounts range from a few dollars to several hundred dollars (Record, pp. 30-41).

Petitioner Cohn refused to sign any checks in accordance with these "schedules", taking the position that he was acting as trustee for Petitioners Berger and Kaminsky in the distribution of the fund, and could not distribute the same except upon *some* evidence at least that the persons named on the schedules were entitled to share in the fund in the amounts stated on the schedules. Whereupon the United States Attorney for the Eastern District of New York petitioned the District Court for an order punishing Petitioner Cohn as for a contempt.

On the hearing of this petition, the Petitioners submitted affidavits of eight persons who were listed on the schedules as being entitled to participate in the fund in substantial amounts, in which the affiants disclaimed ever having made any claim of underpayment under the Fair Labor Standards Act, or that they were entitled to receive any money from either Promenade Clothes, Inc. or Petitioners Berger and Kaminsky on account of any such underpayment. Most of the affiants also showed in their affidavits that *they did not, by reason of the nature of their employment, come under the provisions of the Fair Labor Standards Act* (fols. 256-258, 260-261, 265-266, 270-271, 274-275, 280-281, 285-286, 290-291).

In addition, Petitioners Berger and Kaminsky made affidavit that, according to their books and records, no money was due to any of the persons mentioned on the schedules; that if any moneys were due to any of them, that could only be the result of some errors in bookkeeping; and that, in any event, the sums due would amount only to a small fraction of the fund on deposit with Brooklyn Trust Company (fol. 190).

Petitioner Cohn submitted an affidavit as to the arrangements which led up to the deposit of the fund, and the terms upon which the deposit was made, as well as to the facts with respect to the refusal of the Wage & Hour Division to disclose either to him or to Algase any evidence as to the correctness of the schedules or the "formula" upon which the same were based (fols. 161-176). Algase made similar affidavit with respect to himself (fols. 240-248).

The Wage & Hour Division did not controvert any of the facts stated in the said affidavits. Nor did the Wage & Hour Division present to the Court the slightest evidence as to the correctness of the schedules, or disclose to the Court the alleged "formula" upon which they were based. Nor did any person familiar with the facts make affidavit as to the correctness of the schedules.

The District Court thereupon made an order directing Petitioner Cohn to sign checks drawn upon the Brooklyn Trust Company for the distribution of the fund in accordance with the "schedules" prepared by the Wage & Hour Division. The decision of the United States Circuit Court of Appeals here sought to be reviewed affirmed the said order, holding that Petitioner Cohn was liable to punishment as for a contempt if he failed to comply with its directions.

B

The Statutes Involved

The salient provisions of the Federal Probation Act are as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction

or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition of execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

"*While on probation* the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation *to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had*, and may also be required to provide for the support of any person or persons for whose support he is legally responsible." (Emphasis supplied throughout unless otherwise stated.)

U. S. C. A., Title 18, Section 724.

"At any time after the probation period, *but within the maximum period for which the defendant might originally have been sentenced*, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

U. S. C. A., Title 18, Section 725.

The provisions of the Fair Labor Standards Act, Title 29, U. S. C. A., Section 216, are as follows:

"Penalties; civil and criminal liability

(a) Any person who wilfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. *No person shall be imprisoned under this sub-section except for an offense committed after*

the conviction of such person for a prior offense under this sub-section.

(b) Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

C

Questions Presented

The questions presented by the case, and of which review is sought by this petition, are as follows:

1. Has a District Court of the United States the power to place on probation a person convicted under, or who pleaded guilty to, an information charging him with a violation of the Fair Labor Standards Act, who had never been convicted of such offense before, in view of the provisions of the Fair Labor Standards Act that persons who have not previously been convicted thereunder are not liable to imprisonment?

2. Has a District Court of the United States, in placing a person on probation, the power to direct the payment of a gross sum of money as alleged "restitution" to a class of persons, without naming the persons to whom "restitution" should be made?

3. Has a District Court of the United States the power to direct, as a condition of probation, the payment, as alleged "restitution", of sums of money to be determined by a person other than the Court itself?

4. Has a District Court of the United States the power, in placing a person under probation upon conviction or a plea of guilty to a particular offense charged in an indictment or information, to direct the payment to persons other than those involved in the offense charged in the indictment or information, because they were allegedly wronged by offenses similar to the one of which the defendant had been convicted or to which he had pleaded guilty?

5. Has a District Court of the United States the power, in placing a defendant under probation, to direct, as one of its conditions, the payment of money to persons other than those mentioned in the indictment or information involved, because they had allegedly been wronged by offenses similar to those charged in the indictment or information, where the aggregate amount so directed to be paid is in excess of any fine which the Court could have imposed as a punishment for the offense charged?

6. Has a District Court of the United States the power, in making a probation order, to impose as one of its conditions the payment of moneys to persons other than those mentioned in the indictment or information, because they had allegedly been wronged by offenses similar to those charged in the indictment or informtaion, where the defendant does not admit that such offenses had been committed or that any amount is due to such persons, and there is no proof before the Court upon which the Court could make a finding or judgment that such amounts are actually due?

7. Has a District Court of the United States the power, in making an order of probation, to impose as a condition thereof, the payment of moneys to persons other than those mentioned in the indictment or information, because they had allegedly been wronged by offenses similar to those charged in the indictment or information, where the defendant does not admit that such offenses had been committed or that anything is due to such persons, and there is no proof before the Court upon which the Court could make a finding or judgment that such amounts are due, and where not only the aggregate amount ordered to be paid but each of the separate amounts directed thereby involves a sum which would entitle the defendant to a trial by jury under the United States Constitution if the person or persons to whom payment is directed were to sue therefor?

8. Has a District Court of the United States, having made an order of probation, and having prescribed, as conditions thereof, the payment of a sum of money as alleged "restitution" to a class of persons assumed to have been wronged by the commission by the defendant of offenses similar to those charged, and the said sum of money having been deposited with the Court in compliance with such order, the power to then make an order distributing such fund to various persons, not named in the order of probation, without a finding or adjudication, or any proof, that such persons had been so wronged or are entitled to share in such fund in the amounts in which distribution is directed?

9. Has a District Court of the United States, in the last mentioned situation, where the class of persons to whom the sum of money is directed to be paid by the probation order is intended to include all of the persons belonging to that class, such persons having an independent right of action against the defendant, the power to make an order dis-

tributing the fund without proof that the distributees are entitled to share therein, thereby exposing the defendant to suits by persons whose claims the deposit was intended to extinguish?

10. Has a District Court of the United States, in placing on probation a person who had pleaded guilty to an information charging him with a violation of the provisions of the Fair Labor Standards Act, by reason of an alleged specific underpayment by a corporation of which he was an officer to one of its employees during a certain week, the power to provide, as one of the conditions of probation, that such person pay as alleged "restitution" all moneys that may be due to employees of such corporation by reason of alleged underpayments by such corporation under the provisions of the Fair Labor Standards Act over a long period of time?

11. Has a District Court of the United States, having made an order placing on probation a person who has pleaded guilty to an information charging him with a violation of the Fair Labor Standards Act, and having directed such person, as one of the conditions of probation, that he pay a gross sum of money as alleged "restitution" to his employees, or the employees of a corporation of which he was an officer, for underpayments under the Fair Labor Standards Act, and such sum having been deposited with the Court in compliance with such order, the power to make an order directing the money so deposited to be distributed in a manner to include persons who do not come under the provisions of the Fair Labor Standards Act?

12. Has a District Court of the United States, having made an order placing on probation a person who has pleaded guilty to an information charging him with a violation of the Fair Labor Standards Act, and having directed in such order that as one of the conditions of

such probation such person pay a gross sum of money to a class of persons therein described, and such person having offered to pay such sum into court for distribution among the persons coming within the provisions of such order, and the Court having refused to accept such sum of money, and such person and the prosecuting agency having thereupon agreed to deposit such sum within a bank, to the order of his attorney and the attorney for the agency, to be distributed by them jointly to the class of persons described in such order, the power to then make an order directing that the fund be distributed to certain persons, without any adjudication, or proof of which a court record is made, that the persons to whom payment is directed to be made in the last order are entitled to share in such fund, or are within the class designated in the probation order?

13. Has a District Court of the United States, in the situation last described as to the manner in which the fund came into existence, the power to make an order directing the distribution of such fund, without consent of the attorney for the person who created the fund, where such attorney, in good faith, refuses to make such distribution because of a lack of proof submitted either to the Court or to him, that the persons to whom distribution is directed are entitled to share in such fund to the extent to which payment to them respectively is directed, and where it affirmatively appears that at least some of the persons to whom payment is so directed are not entitled to share therein and are not members of the class described in the order of probation?

14. Has a District Court of the United States, in the situation last described as to the manner in which the deposit or fund came into existence, the power to direct the attorney for the person creating the fund, who voluntarily assumed the co-trusteeship of such fund in the belief that the fund was to be distributed upon satisfactory proof

of a right to share therein, to distribute the same without such proof, on pain of punishment as for contempt of court for his failure to do so, where the attorney claims in good faith that the distribution ordered is in violation of the agreement under which the fund was deposited, where there is no evidence before the Court that the persons to whom distribution is directed are entitled to share in said fund, and where there is evidence before the Court that at least some of them are not so entitled?

15. Has a District Court of the United States, in the situation last hereinbefore described as to the manner in which the fund came into existence, the power to order the distribution of the fund without actual proof furnished to the attorney for the person who created the fund, or to the Court, that the persons to whom distribution is directed are actually entitled to share in the fund to the extent to which payment to them, respectively, is directed, where there are no actual claimants before the Court, and where none of the persons of the class described in the order of probation as the class to whom "restitution" is to be made is before the Court, so that the order would not constitute an adjudication binding upon them as to the amounts actually due them?

D

Reasons Relied On For the Allowance of the Writ

(1) The questions presented in this case are of crucial importance in the administration of the criminal laws of the United States; particularly in the administration of the Federal Probation Act and in the administration of the criminal provisions of the Fair Labor Standards Act.

(2) The decision sought to be reviewed, insofar as it holds that the District Courts of the United States have

power to place a defendant on probation in a case in which no sentence of imprisonment could be imposed, is contrary to previous decisions of this Court.

(3) The decision sought to be reviewed, insofar as it holds that the District Court of the United States, in placing a defendant on probation, may impose as a condition of such probation the payment of moneys as alleged "restitution", to persons other than those wronged by the specific offense of which the defendant had been convicted or to which he pleaded guilty, is in conflict with the decisions of federal courts in circuits other than the Second Circuit.

(4) The other questions involved, in which the decision sought to be reviewed is not contrary to decisions of this Court or in conflict with decisions in other circuits, have never been passed upon by this Court, and it is in the public interest that those questions be passed upon by this Court and the law with respect to the same authoritatively settled.

E

Jurisdiction

Jurisdiction is claimed under the Judicial Code, Sec. 24 (1), (2), as amended, 28 U. S. C. Sec. 41 (1), (2); Judicial Code, Sec. 128, as amended, 28 U. S. C. Sec. 225; Judicial Code, Sec. 240, as amended, 28 U. S. C. Sec. 347.

WHEREFORE your Petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review, a full and complete transcript of the record of

all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, January 6, 1945.

LOUIS B. BOUDIN,
Of Counsel for Petitioners.

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UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The opinion of the Court below has not yet been reported.

II

Jurisdiction

The statutes under which jurisdiction is claimed are stated in the petition.

III

Statement of the Case

A summary statement of the case has been given in the foregoing petition, and for brevity that statement is not repeated here.

IV

Specifications of Error

Without discussing all the errors indicated in the questions presented, as enumerated in the foregoing petition, we may point out here that the Circuit Court of Appeals committed grave error in holding—

(a) That the District Court had power to place Petitioners Berger and Kaminsky on probation, notwithstanding the fact that they were first offenders and a prison sentence could therefore not have been imposed upon them under the provisions of the Fair Labor Standards Act.

(b) That the District Court had power to order, as one of the conditions of such probation, that Petitioners Berger and Kaminsky, jointly and severally, pay the sum of $27,094.08 to the employees of Promenade Clothes, Inc., and without naming the persons to whom payment should be made and in what amounts, delegating the decision as to the persons who were to share in the fund, and the extent to which they were to share therein, to the Administrator of the Wage & Hour Division.

(c) That the District Court had power to order, as a condition of such probation, that Petitioners Berger and Kaminsky pay as alleged "restitution" a sum of money greatly in excess of the loss sustained or damage caused by the offenses to which they had pleaded guilty to the persons aggrieved thereby.

(d) That the District Court, after both the period of probation and the time for which a person could be sentenced to imprisonment under the Fair Labor Standards Act had expired, had jurisdiction of the case, and the power to order the distribution of a fund which Petitioners Berger and Kaminsky had voluntarily deposited in a bank, in an effort to pay the legitimate claims of the employees of Promenade Clothes, Inc. for underpayment under the Fair Labor Standards Act.

(e) That the District Court not only had jurisdiction over the case and the power to order the distribution of such fund, but that it could order the distribution thereof contrary to the terms upon which it was deposited, namely, that both of the persons to whose credit it was deposited should be reasonably satisfied that the distributees were persons entitled to share therein under the provisions of the probation order.

(f) That the District Court had power to order the distribution of the said fund to persons whose claims were disputed by Petitioners Berger and Kaminsky, without any proof before the Court that the persons to whom the Administrator of the Wage & Hour Division ordered distribution of the same were actually entitled to share therein to the extent to which payment to them was directed by the Administrator.

(g) That the District Court had the power to order the distribution of the fund to the persons and in the amounts requested by the Administrator of the Wage & Hour Division, in the face of uncontroverted proof presented to the Court that at least some of the persons included in the "allocation" were not only not entitled to share in the fund, but were not members of the class of persons to whom "restitution" was directed to be made by the probation order, and to whom "restitution" could not have been ordered by reason of the fact that they were not persons coming within the purview of the Fair Labor Standards Act.

(h) That the District Court had jurisdiction over Petitioner Cohn, and the power to order him, on pain of punishment as for a contempt of court, to sign checks for the payment of money out of the fund involved herein, contrary to the terms of the private trust voluntarily assumed by him, and in the face of incontrovertible proof that some of the distributees named in the order were not entitled to share in the fund, were not persons of the class designated in the order of probation, and were not "employees" coming within the purview or protection of the Fair Labor Standards Act.

V

Argument

A

The order made by the District Court violated the due process clause of the Constitution, as well as the constitutional provision for trial by jury.

The Court below brushed aside the constitutional questions raised by Petitioners as so devoid of merit as not not to deserve any discussion. We respectfully submit that in so doing the Court below completely misapprehended the nature of the questions involved.

It must be borne in mind, in the first place, that the money in the fund involved was not a fine. It was not directed to be paid to the United States, but to a class of persons to whom money was supposed to be due from Promenade Clothes, Inc. by reason of an alleged wrong committed against them. It will be conceded that the Court could not order the payment of money as alleged "restitution" unless money was so due. The Federal Probation Act provides that, as a condition of probation, the Court may require the defendant "to make restitution or reparation to the aggrieved party or parties for actual damage or loss caused by the offense for which conviction

was had". This provision of the statute expressly limits the payment as "restitution" to the loss or damage which had been established to have been caused or sustained by the aggrieved party by the conviction itself. It is because of this that, as will be seen further below, whenever the question was raised either in a Federal or a State court, it has been held that no payment by way of "restitution" can be ordered, except to the person wronged by the specific offense of which the defendant was convicted, and only to the extent of the loss or damage caused by that specific offense. To order more than that would mean the ordering of payment of money without an adjudication that the money was due. *A fortiori*, can no payments be directed to a large class of persons as to whose alleged damage or loss there had been neither trial nor adjudication.

Assuming for the moment that a court has the power, because of its jurisdiction over a defendant as a probationer (which was not the situation in the case at bar,—since the period of probation and the time of jurisdiction provided by statute had both expired) to inquire into and adjudicate upon the defendant's similar wrongs to persons other than those involved in the specific offense of which conviction was had, it clearly could not order any payment without some proof (and that means proof in the record, which a court of review could examine) that the sums of money directed to be paid were actually due to the persons to whom payment was directed to be made, as loss caused or damage sustained by reason of offenses similar to the offense of which the defendant was convicted. To order payment without such proof and adjudication is clearly contrary to the constitutional guaranty of due process.

And it is equally clear that the order affirmed by the decision sought to be reviewed deprived Petitioners Berger and Kaminsky of the right to trial by jury, since not only the aggregate amount involved, but a large number of the individual sums directed to be paid by the order of the

District Court were within the constitutional provision for trial by jury. Here again we must bear in mind that the reason "restitution" may be directed by a probation order without a further trial as to the loss sustained or damage caused by the offense of which the defendant stands convicted, is that such trial has already been had. The conviction itself was the result of a trial in which the defendant had been proven to have caused the damage or loss sustained by the "aggrieved party". But when the Court assumes to impose as alleged "restitution" the payment of sums of money not involved in the conviction had, there is not only no due process if the payment is directed without a trial of the special issue involved in such payments, but there is clearly a violation of the provisions of the Constitution guaranteeing trial by jury if the amount directed to be paid is within the constitutional protection of trial by jury.

B

The District Court had no power to place Petitioners Berger and Kaminsky on probation.

We respectfully submit that the District Court was wholly without power to place Petitioners Berger and Kaminsky on probation; and consequently had no power to impose "restitution" as one of the conditions of such probation.

An examination of the history of the problem of probation, and of the adjudications of the courts under probation statutes, including the decisions of this Court under the Federal Probation Act, clearly demonstrates that the intention of the lawmaker was that probation should only be imposed *as an alternative to imprisonment*, and that the statute does not permit probations,—*which is a limited imprisonment in fact and complete imprisonment in theory of law*,—where the offense was such that the Court had no power to sentence the defendant to imprisonment.

Probation is actually imprisonment within what has, in other connections, been called "jury limits", instead of within the four walls of the prison itself. We do not think it is necessary to go into an extended discussion of the history of the Act or an examination of the many cases decided thereunder, and we shall therefore only refer to two cases decided in this Court.

United States v. *Murray*, 275 U. S. 347.
Burns v. *United States*, 287 U. S. 216.

In the first case cited this Court quoted with approval from the Report of the Committee on the Judiciary of the House of Representatives the following statement:

> "Probation is the method by which the Court disciplines and gives an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment."
>
> *United States* v. *Murray*, 275 U. S. 347, 355.

And in the second case cited this Court, giving its own opinion on the subject, said:

> "It (the Federal Probation Act) was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation, *which actual service of the suspended sentence might make less probable.*"
>
> *Burns* v. *United States*, 287 U. S. 216, 220.

C

The District Court had no power to delegate the "allocation" of "restitution".

Assuming for the moment that the District Court had the power to order "restitution" beyond the sum due to the parties mentioned as aggrieved by the specific offense

charged in the first eight counts of the Information, it is clear that the District Court could not delegate that power to anybody else. The ordering of "restitution" to others than the persons and for the amounts involved in the first eight counts of the Information involves an adjudication that the amounts were due. *That is clearly a judicial function which no one but a court could perform.*

Such a delegation, we respectfully submit, is wholly void,—unless made under statutory authority and with provision for judicial review. It was void in the original order. And it was void in the second order (assuming that the District Court had jurisdiction of the defendants, which it did not),—because it was not made in pursuance of any statutory authority nor based on any proof submitted to the Court, but in terms was merely a direction to pay "allocations" made by someone else.

D

The District Court was wholly without jurisdiction over Petitioners Berger and Kaminsky at the time of the making of the order affirmed by the decision sought to be reviewed.

The Federal Probation Act specifically provides that restitution may only be directed to be made by the defendant "*while on probation*". In this case the period of probation was eighteen months, and had expired long before the order in question was made by the District Court. The Probation Act also provides that before the expiration of the period of probation or within the period for which the defendant *could have been sentenced to imprisonment,* the District Court may, in case of a violation of the terms of probation, bring the defendant before itself, revoke the probation, and impose sentence.

Aside from the fact that this clearly proves,—if further proof were necessary,—that probation can only be ordered where sentence of imprisonment could be imposed,—the provision places a limit upon the jurisdiction of the Dis-

trict Court measured by the term for which imprisonment could have been imposed. The maximum term of imprisonment prescribed by the Fair Labor Standards Act (in cases where imprisonment may be imposed thereunder,—i.e., in case of second offenders and beyond) is *six months*. That period had, of course, expired long before the questioned order was made. The District Court had therefore completely lost jurisdiction over the Petitioners Berger and Kaminsky and over the case before it made the order affirmed by the decision sought to be reviewed.

E

The District Court had no jurisdiction over Petitioner Cohn.

Petitioner Cohn came into the case as a result of a voluntary private arrangement between Petitioners Berger and Kaminsky and the Wage & Hour Division when the District Court refused to accept the money tendered by them in attempted compliance with the order of probation. In offering the money into court Petitioners Berger and Kaminsky had a right to assume, and undoubtedly did assume, that the Court would not pay any part thereof except to persons entitled to payment under the provisions of the Fair Labor Standards Act. And the Court refused to accept the money tendered, because it did not want to assume the burden of making such determination, involving, as it did, the trial of many claims. Under the circumstances, Petitioners Berger and Kaminsky having expressed a willingness to pay any legitimate claims under the Fair Labor Standards Act to the employees of the corporation of which they were or had been officers, the money was deposited in a bank to the order of their attorney and the attorney for the governmental agency interested in the prosecution, upon the specific understanding that the attorneys would examine into and determine the questions of fact involved, and pay the legitimate claims of Promenade's employees under the Fair Labor Standards Act.

It must be borne in mind that *no order was ever made* by the Court, either directing the deposit to be made or appointing Petitioner Cohn as one of the holders of the deposit. The functions assumed by Petitioner Cohn in connection with the deposit were wholly voluntary and extra-judicial, in an honest effort to use the fund for the satisfaction of honest claims of persons belonging to the class described in the probation order.

This did not make the deposit a deposit into court, nor did it make Petitioner Cohn a court functionary or a person performing duties and under appointment by a court. What the two attorneys undertook was to act as the trustees of an express trust created by a private arrangement in order to carry out a purpose which a court had indicated ought to be accomplished, but for the accomplishment of which it had declined to use its power or machinery. In this situation, we respectfully submit, their action was not subject to the control of the Court; although they might be subject to suit by the persons for whose benefit the trust was created if they acted contrary to the terms of the trust. Probably, also, the persons for whose benefit the fund was created could come into court and demand its distribution in a proper suit. But until such a suit were brought, the District Court was wholly without jurisdiction either over the fund or Petitioner Cohn.

Assuming, however, that the District Court had jurisdiction over the fund, it is clear that all it could do in the circumstances would be to declare Petitioner Cohn's office as trustee vacant; and itself assume the distribution of the fund in a proper proceeding and under proper protection to the rights of Berger and Kaminsky.

We respectfully submit that under no circumstances could the District Court direct Petitioner Cohn to act contrary to his own conscience as well as the terms of his trust, on pain of being punished as for a contempt of court in case of non-compliance.

F

The District Court was wholly without power to order the payment of the sum involved as "restitution".

We respectfully submit that upon general considerations as well as authority it is beyond question that the District Court was without power to order "restitution" except of the few paltry sums involved in the first eight counts of the Information. Passing the constitutional question involved, unless the amounts to be paid were determined in a separate suit, or in some proceeding ancillary to the criminal prosecution for which there was specific statutory provision, it is clear that the statute itself limits the power of the District Court to order restitution to the loss or damage caused by the specific offense charged in the indictment or information under which the defendant was convicted or to which he pleaded guilty. And it was specifically so held by Judge Maris of the United States Circuit Court of Appeals for the Third Circuit sitting in the District Court for the Eastern District of Pennsylvania, in the case of *United States* v. *Follette* (32 Fed. Supp. 953).

In that case the defendant, one Marguerite Follette, was charged in the indictment with embezzlement and conversion of $203.99 of United States postal funds, while an employee of the United States Government. She pleaded guilty to the charge, and it was established that she had actually stolen $466.28, which she promised to repay, and it was therefore made a condition of her probation. The matter came before Judge Maris upon an application to extend the probation period, when for the first time, two questions were raised—one, whether restitution could be made a term of the probation in this case at the request of the National Surety Company, which had paid to the United States Government the amount of the defalcation; and, if such an order could be made, whether it could direct payment beyond the amount of the embezzlement of which the defendant stood convicted. Judge Maris decided

the first question in the affirmative and the second question in the negative, and accordingly ordered the probation order modified by reducing the amount of the restitution to the amount involved in the crime of which the defendant stood convicted. In disposing of these questions Judge Maris said:

> "The first of these questions is whether the Court has power to impose as a condition of probation restitution to the defendant's surety of sums which it has paid in making good the defendant's defalcations. The power of the Federal Courts to suspend the execution of sentence and admit a defendant to probation is conferred by the Federal Probation Act. It will be seen from the last paragraph of section 1 of the act, 18 USCA, section 724, that when restitution is made a condition of probation, it may only be ordered to be made to 'an aggrieved party and for actual damages or loss caused by the offense for which conviction was had'. Although the first paragraph of the section authorizes the courts to place defendants on probation 'upon such terms and conditions as they may deem best', I think it clear that this general language is limited by the later specific provision so far as restitution is concerned.
>
> "The question, therefore, resolves itself into whether a surety is 'an aggrieved party' within the meaning of the act so that an order of restitution may properly be made in its favor. * * *
>
> "The second question for my consideration relates to the amount of restitution which may be ordered. It is said that the court does not have the power to order restitution in an amount greater than the amount involved in the particular offense for which the defendant has been convicted. Whereas great latitude is given by the act to the judge to fix such terms and conditions as to him may seem best, his right to order restitution may only be 'for actual damages or loss caused by the offense for which conviction was had.' *It seems to me that just as a court which is given the power to impose a fine may do so only within the limits fixed by the penal statute, so the order to make restitution must be kept within the limits set in the phrase just quoted.*

"In the present case the offense charged in the indictment to which the defendant pleaded guilty, 'for which conviction was had', was the embezzlement and conversion of $203.99. A conviction for embezzlement and conversion of a greater sum could not have been had on this indictment. *I conclude, therefore, that the condition for restitution in this case must be modified so as to relate to the embezzlement of $203.99 only,* credit being given for the partial restitution heretofore made."

United States v. *Follette,* 32 Fed. Supp. 953, 954-955.

It is suggested by the decision sought to be reviewed that even if this point were well taken, it is too late to raise it now, after the period for appeal has expired. We respectfully submit that the learned Circuit Court is clearly in error. Where a criminal court is without power to impose the sentence actually imposed because the statute does not provide for so large a sentence, the sentence, insofar as it exceeds the limitations imposed by the statute under which it is pronounced, is wholly void for want of jurisdiction. Usually this question arises in cases of imprisonment, and it is well settled law that in such cases the defendant may sue out a writ of *habeas corpus* after he had served the maximum sentence which the Court could have imposed.

Ex parte Wilson, 114 U. S. 417.
Ex parte Lange, 18 Wall. 163.
Hill v. *United States,* 295 U. S. 460.
Ex parte Watkins, 7 Pet. 568.
Re Banner, 151 U. S. 242.
People ex rel. Tweed v. *Liscomb,* 60 N. Y. 559.
Cf. Matter of Morhous v. *N. Y. Supreme Court,* 293 N. Y. 131.

Besides, in this case there was no effective order until the questioned order was made. And, in any event, a new

order attempting to enforce an order which the Court was powerless to make in the first instance,—the last order in itself being concededly appealable,—cannot be sustained.

The Circuit Court of Appeals, apparently realizing the weakness of its position, suggests as an alternative ground for upholding the District Court that the amount ordered to be paid could be justified as "restitution" under Count XI of the Information, which charged the defendants with failing to keep proper books, or keeping false books. This, on the truly amazing theory that it could be said that loss or damage had been caused to Promenade's employees to the extent of the underpayment, if any, by Promenade's failure to keep proper books. We respectfully submit, with all due respect to the learned Court whose decision is sought to be reviewed, that this is a wholly unwarranted stretching of the statute involved as well as of the English language. If that statement be law, then the District Courts have been clothed with powers undreamed of by the lawgiver and which those courts had never thought they possessed. By way of illustration only: The Bankruptcy Law provides that it is an offense against the United States for any person or corporation to falsify its books or records in contemplation of bankruptcy. If the law laid down in this case by the learned Circuit Court of Appeals is permitted to stand, a District Court, upon the conviction of a bankrupt or of an officer of a bankrupt corporation, of tampering with the bankrupt's books or falsifying the same in contemplation of bankruptcy, could place him on probation, and as an incident thereto order him to pay all of his debts or all the debts of the corporation of which he was an officer.

It will be said, of course, that such a construction of the law would be absurd, since the falsification of the books did not cause the loss or damage which the creditors sustained by the non-payment of their debts, and the debts could be proved without the books. But that is exactly the situation with respect to the employees of Promenade. It is the underpayment that hurt them, and not the falsification of the books.

In view of the extraordinary character of the proposition, it would seem unnecessary to discuss it any further. Nevertheless, we shall point out two considerations which conclusively demonstrate the untenability of the decision. In the first place, the Federal Probation Act specifically provides that restitution must be made only to the "aggrieved" party or parties. There must therefore be a party or parties before the Court who claim to be aggrieved. No such parties appeared before the District Court in this case. No one came into court saying that he or she had been aggrieved either specifically by the failure of Promenade to keep proper books, or generally by underpayment under the Fair Labor Standards Act. On the other hand, *eight persons included in the order for distribution* did appear in court and stated *on the record that they had not been aggrieved in any way either by Promenade or Petitioners Berger and Kaminsky by anything contained in the Information to which they had pleaded guilty.*

And there is the provision of the Fair Labor Standards Act limiting the fine which could be imposed under Count XI of the Information to $10,000. Surely, the amount of restitution ordered without a specific adjudication of the amount due could not exceed the amount of the fine which the Court is authorized to impose. Such indirect method of fining a defendant was clearly not contemplated by those who advocated the great reform involved in the probation system, and is certainly not authorized by the Federal Probation Act. Instead of a reform to be proud of, such an interpretation of the Act would make an engine of oppression.

C

Petitioners Berger and Kaminsky were vitally interested in the proper distribution of the fund involved.

All of which brings us back to the real point in dispute between the Petitioners and the Wage & Hour Division,—namely, *the proper distribution of the fund involved.* As

already stated, and as the record abundantly proves, the reason the power of the Court to require restitution in the amount named in the probation order was not questioned at the time, was, that Petitioners Berger and Kaminsky had no objection to paying the legitimate claims of Promenade employees under the Fair Labor Standards Act. Promenade Clothes, Inc. is a small corporation, largely, if not wholly, owned by Petitioners Berger and Kaminsky. The employees of Promenade had a right of action under the Fair Labor Standards Act for any underpayment, and Petitioners Berger and Kaminsky were therefore interested that such claims be satisfactorily disposed of. They therefore apparently had no objection to the payment provided for in the probation order. They had a right to assume that the order would be strictly complied with and only legitimate claims under the Fair Labor Standards Act would be paid as "restitution" under the order.

When the Court refused to accept the money offered by them they were willing to enter into a private arrangement to accomplish the same purpose. This they did by means of the deposit with Reyman and Cohn as trustees. And they would now have no objection to the original order if payments were made as provided in the probation order,—that is to say, to persons who presented proof satisfactory to a court (or to the two trustees) that they had legitimate claims under the Fair Labor Standards Act. The dispute arose not because of any unwillingness of Petitioners Berger and Kaminsky to pay such claims, but because of the arbitrary stand taken by the Wage & Hour Division, that it may distribute that fund without regard to the genuineness of the claims presented,—indeed without any claims presented, and *without making provision for the payment of genuine claims.*

The Petitioners Berger and Kaminsky were vitally interested not only that no part of their money should be paid to persons not entitled thereto, *but that the money deposited by them should be used for the discharge of the*

debts of Promenade, since if those debts were not discharged out of this fund, the corporation which they owned, or they themselves, would have to pay the same.

To this, we respectfully submit, they were entitled under the Constitution of the United States, as well as under the statutes involved, if properly interpreted. They were entitled to that even under the very terms of the probation order,—which the questioned order purports to enforce, but actually violates. They were certainly entitled to that under the terms of the agreement under which the deposit was made and Petitioner Cohn made co-trustee of the fund.

Conclusion

This case is clearly one in which great public interests are involved, both because of the constitutional questions raised and the proper administration of two important statutes which are constantly before the courts. A *writ of certiorari* should therefore be granted by this Court to review the decision of the Circuit Court of Appeals, so that a full argument of the many serious questions involved may be had, and judgment directed by this Court in accordance with the constitutional rights of the parties and the proper interpretation of the important statutes involved.

Dated, New York, January 6, 1945.

Respectfully submitted,

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Of Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 826

NATHAN BERGER, SAMUEL KAMINSKY, AND SIDNEY E. COHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 116–121) and of the District Court (R. 100–104) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 21, 1944 (R. 122). The petition for a writ of certiorari was filed on January 10, 1945. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTIONS PRESENTED

The petitioners Berger and Kaminsky pleaded guilty to violations of the Fair Labor Standards Act, and were placed upon probation by the district court. The probation order provided, *inter alia*, that they should pay a specified amount as restitution of wages unlawfully withheld from their employees, and that such amount should be allocated among the employees in a manner to be determined by the Wage and Hour Division. In compliance with this provision, to which they had consented, the petitioners tendered the specified amount in the court, which then directed that the money be deposited in a joint bank account in the names of the petitioner Cohn, counsel for the other petitioners, and the regional attorney for the Wage and Hour Division, and that it be disbursed according to the allocations to be made by the Division. Subsequently, when such allocations were made, Cohn refused to sign any checks for distributing the fund. The district court thereupon ordered Cohn to sign the necessary checks.

Although the petition for certiorari presents fifteen questions, we believe that, in essence, only three issues are involved:

1. Whether the validity of the probation order is open to attack by the petitioners in the present proceeding.

2. If the first question should be answered in the affirmative, whether the probation order was valid.

3. Whether the order directing Cohn to sign the checks was proper as an incident to the enforcement of the probation decree.

STATUTE INVOLVED

Although the case arose originally under the Fair Labor Standards Act of 1938,[1] Section 1 of the Probation Act[2] is the only statutory provision involved here. It provides:

> the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*

[2] Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by Act of June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725.

probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

STATEMENT

On October 20, 1941, petitioners Berger and Kaminsky pleaded guilty to an information charging them with violations of the Fair Labor Standards Act (R. 2). Imposition of sentence was suspended, and they were placed on probation (R. 2–3). One of the conditions of the probation order was that they make restitution to their employees of wages unlawfully withheld, in the sum of $27,094.08 (R. 22–23). The petitioners had agreed, prior to entry of the order, that that amount was due and owing to their employees (R. 27, 76, 101, 120). They had also consented to the provision of the probation order directing the Wage and Hour Division to allocate the money among the individual employees (R. 27, 76, 101, 120).

In June 1942, Berger and Kaminsky "appeared in Court, and through their Counsel Sidney E.

Cohn, offered to pay * * * the full amount of $27,094.08 into Court * * *" (R. 102). The district court directed the petitioners and the Labor Department's representative to agree upon "the place and manner of deposit" of the tendered sum (R. 102, 118). The attorneys agreed to deposit the money in a specified bank to their joint order (R. 102, 118). This was approved by the district court, and the deposit was made (R. 102, 118). Having thus complied with the condition of the probation order, Berger and Kaminsky were discharged from probation (R. 28, 103, 118).

After the Wage and Hour Division had allocated the money among the employees as directed by the court order, petitioner Cohn refused to sign checks distributing the fund (R. 103, 118). The United States Attorney then applied for an order directing Cohn to sign the checks (R. 26–29). In an affidavit (R. 54–59) filed in opposition to this application, Cohn alleged that the district court had modified the original probation order by making it the joint responsibility of Cohn and the Division to determine the amounts, "if any," due to employees (R. 55). The district court ordered petitioner Cohn to sign the checks (R. 98–99). In his opinion, the district judge stated that Cohn was seeking the adoption of a method of allocation different from that provided by the probation order; that the deposit was made at the court's direction and with its approval, in pursuance of

the terms of the probation order; that the court had never modified those terms; and that when the probation order was made, Berger and Kaminsky and their attorney clearly understood that "control of allocation by the Wage and Hour Division was necessary to protect the employees", and that they had voluntarily accepted such control (R. 102–103).

The Circuit Court of Appeals, in affirming the district court's order, noted that "The record shows that the deposit was made * * * with the approval of the [district] court and was treated by the court as the fulfillment by Berger and Kaminsky of the conditions of their probation. It was by no means merely the private arrangement which the appellants now call it". (R. 121.) The court below also held that "it is now too late for appellants, Berger and Kaminsky, to object to the amount or the manner of the distribution" (R. 120–121); that "Cohn [has no] interest to protect in respect to the content and conditions of the probation order" (R. 121), and that the order under review was simply "in aid of the enforcement of the order of probation" (R. 121), and conferred no rights upon Cohn nor any duty other than that of distributing the money as the court ordered; and that in any event both the probation order and the order appealed from were without error (R. 119–120, 121).

ARGUMENT

The decision below is correct, and neither a conflict of authorities nor any question of importance is presented.

1. The petitioners' complaint is directed primarily against the validity of the original probation order, rather than the order immediately involved here. We submit, however, that if the probation order is open to collateral attack in the present proceeding, the scope of review is limited to the jurisdiction of the district court to issue the order. *In re Eckart*, 166 U. S. 481, 485; *Riddle* v. *Dyche*, 262 U. S. 333; *In re Belt*, 159 U. S. 95; *Ex parte Bigelow*, 113 U. S. 328. The petitioners do not raise any jurisdictional questions. No claim is here made that the district court lacked jurisdiction over the petitioners and the offense with which they were charged. Whether the court was authorized to place Berger and Kaminsky on probation, and to order restitution as a condition of probation, relate only to the proper exercise of the court's jurisdiction.[3] *In re Eckart* and other cases cited, *supra*.

[3] Berger and Kaminsky voluntarily accepted the terms of the probation order (R. 101, 120). Having done so, they can hardly now contest the validity of the decree. Since Cohn, their attorney, has no pecuniary or other substantial interest in the probation order, he likewise lacks standing to attack its validity in the present proceeding. *Grant and Burlingame* v. *United States*, 227 U. S. 74.

2. In any event, the probation order was clearly valid. The petitioners contend that the district court's power to place defendants on probation is limited to convictions for which a sentence of imprisonment can be imposed. Section 16 (a) of the Fair Labor Standards Act limits punishment of first offenders to fines up to $10,000 for each offense. Berger and Kaminsky, who faced the possibility of fines totaling $260,000, now contend that because they were first offenders, the district court had no authority to admit them to probation.

The court below properly rejected this argument, stating that "the Probation Act * * * contains no such limitation upon its scope" (R. 119). No basis can be found in the Act for the inference that it is limited to crimes punishable by imprisonment. The purpose of the Probation Act is "to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable" (*Burns* v. *United States*, 287 U. S. 216, 220). This purpose may well be served by relieving a penitent offender of the hardship and expense of a fine. The interpretation adopted by both courts below permits this to be done. It enables penitent offenders to be benefited without injury to the public. On the other hand, no useful purpose is to be achieved by

reading into the Act the limitations urged by the petitioners. The petitioners' construction would limit the power of the courts to do justice according to the necessities of particular cases, and would compel them to impose fines that might otherwise be suspended to the benefit of the defendants and the public. Since the Probation Act is remedial, the Court should resolve any ambiguity in favor of the more liberal interpretation. *Scalia* v. *United States*, 62 F. (2d) 220 (C. C. A. 1); *Rosenwinkel* v. *Hall*, 61 F. (2d) 724, 726 (C. C. A. 7); *Reeves* v. *United States*, 35 F. (2d) 323, 325 (C. C. A. 8); *Nix* v. *James*, 7 F. (2d) 590 (C. C. A. 9).

The petitioners further contend that the restitution ordered to be paid in this case did not constitute a loss "caused by the offense for which conviction was had", and hence was not a proper condition under the Probation Act. As the court below held (R. 120), however, a sufficient basis for the order is found in count XI of the information. That count charged generally a failure to keep records of wages paid and hours worked. While a failure to keep records, standing alone, would not cause loss to the employees, "such an offense," the court below stated, "would cause a loss to any employee whose wages were computed and paid incorrectly and in an amount less than was actually due as a result of the * * * failure to keep such records". (R. 120.) The ad-

mission by the petitioners Berger and Kaminsky of the total amount due tacitly conceded that all of their employees suffered loss by the failure to keep records. Hence, the loss of wages for which they were ordered to make reparation was caused by the offense "for which conviction was had."

The information, read as a whole, indicated a continuing unlawful course of conduct, of which count XI was but a part. It made clear that Berger and Kaminsky were guilty of continuing violations of the Fair Labor Standards Act with respect to all their covered and nonexempt employees. It would have been impracticable to set out a separate count for each underpayment to each employee for each workweek. There is no occasion to consider whether the court could have ordered Berger and Kaminsky to make restitution without their consent. Since they conceded the entire amount due, agreed to make the payments, and acquiesced in the method of allocation (R. 101, 120), all the requirements for a valid restitution order are supplied by the information or by the oral stipulation of the petitioners. Under those circumstances, the restitution order was without error.

3. The order requiring Cohn to sign the checks necessary for distribution of the fund held in the joint bank account was clearly a proper exercise of the district court's discretion in enforcing the probation decree. The order was not intended

to, and did not, create or continue any obligations or rights with respect to Berger and Kaminsky. It merely required Cohn who had "accepted the obligations of one designated to aid in carrying out the probation order" (R. 121), to perform the ministerial function the court had delegated to him. When the money was tendered into court and deposited in the bank, the district court, the probation officer, and the Wage and Hour Division took it for granted that the criminal and probation proceedings had come to an end. Accordingly, in the order from which this appeal was taken, the court did not mention Berger and Kaminsky. Nor are they in any way affected by it. They therefore have no standing to contest its validity. *Grant and Burlingame* v. *United States*, 227 U. S. 74; *In re Michigan-Ohio Bldg. Corp.*, 117 F. (2d) 191 (C. C. A. 7).

The problem before the district court was that of distributing the money according to the terms of the order directing the deposit. While the court did not undertake to prepare the schedules itself,[4] it retained jurisdiction to compel distribution according to its mandate. The juris-

[4] It was not necessary for it to do so, as the petitioners contend. This Court has indicated that "where accounts are complex and intricate, or the documents or other evidence voluminous, or where extensive computations are to be made, it is better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself." *Ex-parte Peterson*, 253 U. S. 300, 313.

diction of a court of record once acquired in a cause is not exhausted by rendition of judgment, but continues until the judgment is satisfied and includes the power to issue all proper process necessary to its enforcement. Judicial Code, sec. 262 (28 U. S. C. 377); *Riggs* v. *Johnson County*, 6 Wall. 166; *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453 (C. C. A. 6), affirmed 190 U. S. 147. Hence, when Cohn failed to perform the obligations which he had voluntarily assumed under the order directing the deposit and distribution, the district court could properly compel him to obey its order.

The court below correctly ruled, therefore, that "the order from which he [Cohn] appealed was in aid of the enforcement of the order of probation and was without error," and that he had no interest to protect "in respect to the content and conditions of the probation order" (R. 121). Nor does he have any interest in the allocation of the fund to be distributed. Those who paid the money have already consented to the terms of its distribution. Cohn's sole function, despite his claim of joint responsibility which was rejected by both courts below, was to sign the checks not as a privately interested party, but as an officer of the court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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